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Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, et al.,

Petitioners,

—v.—

DANIEL DONNELLY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE RESPONDENTS

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STATEMENT OF THE CASE

This case challenges the City of Pawtucket's erection of a Nativity scene depicting the birth of Christ as part of the City's Christmas display located in downtown Pawtucket. The display is traditionally set up in Hodgson Park, an urban park area owned by the Slater Mill Association and located along the Blackstone River, approximately three hundred (300) feet from the Pawtucket City Hall. The display is designed by the City Maintenance Supervisor; it is erected, guarded, and dismantled by City employees; and it is wired for lighting by the City's electrician. J.A. 30, 32, 53, 62-63.

Within the display, and challenged here, is a life-sized creche, purchased by the City in 1973 at a cost of One Thousand, Three Hundred, Sixty-Five ($1,365.00) Dollars. The creche encompasses an area of approximately fourteen

(14) feet by ten (10) feet; it includes a stable approximately four and one-half (4-1/2) feet high, together with thirteen to fifteen figures ranging in height from one (1) foot to five (5) feet. The figures include a baby lying in a manger, arms outstretched, two angels, several animals, and several figures kneeling in a posture of worship. All figures are arranged in such a way that their attention is directed to the baby. J.A. 33, 52, 147; Pl. Ex. 1; App. Vol. I, 28-29.[1]

The Nativity scene is set up in the center of the westerly side of Hodgson Park, facing Roosevelt Avenue and directly across from the only two bus shelters located on that block. J.A. 59-60. Also located in various spots throughout the park are other Christmas decorations, not

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1. "J.A." citations are to the Joint Appendix filed with this Court. Other citations to the record before the Court of Appeals are to trial exhibits, with citations such as "Pl. Ex."; and to trial testimony contained in the appellate Appendix Volumes, cited as "App. Vol."

at issue here. These include Disney characters, Santa and his reindeer, a wishing well and a forty (40) foot Christmas tree. J.A. 47, 51. Two spotlights, lit from 5:15 P.M. to 10:30 P.M., are trained directly upon the Nativity scene; ten additional spotlights and numerous smaller lights illuminate the entire Hodgson Park area. The City reimburses the Slater Mill Association for the cost of this lighting. J.A. 43, 40, 59.

Normally, an initial lighting ceremony is the only public gathering that is held in Hodgson Park in concert with the City's Christmas display. However, in 1980, shortly after this suit was filed, the Mayor of the City, Dennis Lynch, held a press conference from a podium set up adjacent to the creche. J.A. 61. During this press conference, according to newspaper accounts introduced into evidence by respondents, the Mayor vowed to fight

the ACLU's attempt to take "Christ out of Christmas". He also walked through a group of children and passed the microphone among them so that they could lead in Christmas carolling. J.A. 94, 103; Pl. Ex. 12.

The Reverend Thomas Ramsbey, a minister of the Methodist church and the holder of a doctoral degree in the areas of social ethics and the sociology of religion, testified for respondents as to the nature of the creche as a religious symbol. Reverend Ramsbey distinguished "sacred" or religious symbols, which are identified closely with one group and which derive their meaning from that group, from "profane" or secular symbols, which are not identified with any particular group but rather "belong to everyone". App. Vol. III, 243. The Nativity scene displayed by the City of Pawtucket is, according to Reverend Ramsbey, plainly a religious

or sacred symbol, designed to make a statement concerning the Divinity of Christ. Id. As a basis for his opinion, Reverend Ramsbey cited the Nativity scene's origin in the New Testament, the worshipful posture of the component figures, and the inclusion of angels, which are "messengers from heaven". Id. at 244-45. Furthermore, the creche continues to be central to the Christian celebration of Christmas and is used by the Methodist Church in worship. Id. at 248, 262. In fact, Reverend Ramsbey testified that as "a very sacred religious symbol" the creche is demeaned by its placement amid secular Christmas symbols. Id. at 244, 252.

In response to Reverend Ramsbey's testimony, petitioners [hereafter sometimes "the City"] introduced testimony by Dr. David Freeman, a professor of philosophy at the University of Rhode Island. App. Vol. III, 284-86. Dr.

Freeman stressed the relationship between the setting in which a symbol appears and the nature of the viewers' reaction to that symbol. Although he testified that "a symbol in a non-religious context will not be a religious symbol and will not have a religious impact," Dr. Freeman agreed with Dr. Ramsbey that any viewer familiar with the New Testament would realize that the Nativity scene was designed to show homage to the Christ child. Id. at 297, 299.

Respondents also introduced expert testimony with regard to the impact of symbolism, such as the creche, upon children and adults. Dr. Michael Werle, a clinical psychologist, testified that during a certain part of their lives, symbols are especially important to children, and that the Nativity scene erected by the City functions as a particularly powerful symbol because of its religious dimensions

and because of the tremendous attraction that the entire Christmas display would possess for a child. J.A. 74-76. According to Dr. Werle, for a child whose family does not adopt the religious teachings expressed by the creche, that symbol, as part of a government sponsored display, will evoke conflict and confusion as to whether the child is truly a part of his country and family and whether he can be part of both. J.A. 76. In adults, publicly supported religious symbols, such as the creche, encourage pride approaching "religious chauvinism" in those who subscribe to the faith associated with the symbol. J.A. 76-77.

Mayor Lynch and two Pawtucket businessmen testified for the City as to the avowed purpose and effect of the City's inclusion of a creche in its Christmas display. The Mayor testified, in apparent contradiction, first that the creche is central to the

City's Christmas experience "for three basic reasons, cultural and tradition, aesthetically, and to the economic well-being of the community," and yet that he considered it "incidental and not the main thing of the Christmas display, not the primary reason". J.A. 92, 106. Myron Stoller, a retailer in downtown Pawtucket and President of the Pawtucket Plaza Associates, and Dennis Moore, Executive Director of Downtown Pawtucket Revitalization, Inc., both testified that, in their opinion, the principal impact of the City's Christmas display as a whole is to bring potential customers into the downtown Pawtucket area and that removal of the creche would in no way affect the commercial impact of the remainder of the display. J.A. 133, 135, 138, 139-40.

Finally, with regard to the divisiveness spawned by this issue, respondents in-

troduced as evidence letters to the editor which appeared in The Providence Journal and in The Pawtucket Evening Times, letters to Mayor Lynch from members of the public, and testimony by Mayor Lynch and Steven Brown, Executive Director of the Rhode Island affiliate of the ACLU. J.A. 151-67; Pl. Ex. 4, 11; App. Vol. II, 218. The District Court after reviewing these exhibits concluded that

> the Court is firmly convinced that they evidence a deep concern about and resentment for what most of the correspondents regard as an attack upon a cherished religious symbol. Although many letters criticized the ACLU as "petty," most writers did not mean that the creche was an insignificant part of the display. Indeed, the intensity of feelings evident in the letters belies any suggestion that the writers regarded this lawsuit as involving a trivial matter.... Overall the tenor of the correspondence is that the lawsuit represents an attack on the presence of religion as part of the community's life, an attempt to deny the majority the ability to express publically its beliefs in a desired and traditionally accepted way.

Donnelly v. Lynch, 525 F. Supp. 1150, 1161-62 (D.R.I. 1981).

After carefully reviewing the evidence before it, the District Court found that Christmas retains strong significance as a religious holiday and that the Nativity scene is primarily an embodiment of Christian beliefs concerning the birth and nature of Jesus Christ. The Court then applied the evidence, outlined above, to each element of the tri-partite Establishment Clause test first set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), and found that the City's actions in erecting and maintaining a Nativity scene as part of its Christmas display violated each aspect of the test. In purpose, in effect, and in the entanglement evidenced by political divisiveness, the City failed to act in such a way as to remove its sponsorship and support of a religious symbol from the prohibitions of the Estab-

lishment Clause.

In its review of the District Court's decision, the United States Court of Appeals for the First Circuit [hereafter "Court of Appeals"] applied the Establishment Clause test set forth in Larson v. Valente, 456 U.S. 228 (1982), decided after the District Court had issued its opinion. In applying a test of strict scrutiny, the Court of Appeals held that the City's actions violated the Establishment Clause because the City had "established no compelling governmental interest in the erection of the Nativity scene." Donnelly v. Lynch, 691 F.2d 1029, 1035 (1st Cir. 1982). Alternatively, the Court affirmed the conclusions of the District Court that the City had failed to prove any legitimate secular purpose for including the creche within its display, and that its erection of the creche had the primary ef-

fect of advancing religion. Id. Consequently, under both the Larson and Lemon tests, the Court of Appeals affirmed the District Court's decision that the City's display of a Nativity scene as part of its annual Christmas display violates the Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Petitioners' purchase and display of the Nativity scene -- paid for with public funds and given official government support -- violates the Establishment Clause in three fundamental ways: (1) by placing the imprimatur of the state on religious beliefs; (2) by discriminating among religious beliefs; and, most basically, (3) by failing to satisfy any, much less all, of the three purpose, effect, and entanglement tests used to determine the permissibility of government activity which assists religion.

1. The Nativity scene, which symbolically re-enacts a central event in Christian religious belief, is undeniably sectarian. In Stone v. Graham, 449 U.S. 39, 42 (1980), this Court held that "the mere posting" of the undeniably sectarian Ten Commandments by a governmental entity provided the official support of religion "that the Establishment Clause prohibits." Similarly, in Larkin v. Grendel's Den, 74 L.Ed.2d 297, 306 (1982), the Court struck down a statute which permitted churches to veto the grant of a liquor license within 500 feet of a church because the "mere appearance of a joint exercise" by Church and State constituted an impermissible symbolic affirmation of the favored status of religion. Official display of the Nativity scene here is far more sectarian than the mere posting of the Ten Commandments in Stone or of the zoning preference in Grendel's Den since the Nativity scene constitutes a state celebration and symbolic affirmation of the Divine nature of

the Christ child. Through the City's display of the Nativity scene, the state has unconstitutionally placed its imprimatur on religious belief.

2. Not only does the Establishment Clause bar placing the imprimatur of the state on religion in general, but it also "mandates governmental neutrality between religion and religion." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). It accordingly is constitutionally impermissible to discriminate among religions generally by disfavoring less established religions, Larson v. Valente, 456 U.S. 228 (1982), and it is similarly discriminatory to give favored status to a majority religion such as Christianity through governmental support of Bible teaching, School District of Abington Township v. Schempp, 374 U.S. 203 (1963). Whether the City of Pawtucket's display of the Nativity scene is viewed as favoring the Christian religion of

the majority of Pawtucket's residents, or whether the government support of Christian beliefs is viewed as discriminating against all other religions, the City's activity violates the neutrality mandate of the Establishment Clause.

3. Most basically, the City's display of an overtly religious symbol violates the Establishment Clause's ban on governmental activity favoring religion since the City's activity satisfies none of the three tests set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

a. First, although the City must establish that its display and support of religious belief has a secular purpose, the record here instead compels the conclusion that the very purpose of the Nativity scene is religious. In fact, one of the primary reasons for the City's maintenance of the Nativity scene is to "keep Christ in Christmas." 525 F. Supp. at 1173, 1180.

b. Second, although the City must establish that its governmental support of Christianity does not have the primary effect of advancing religion, the record here again compels the conclusion that the effect of the City's display of the Nativity scene -- on adults and particularly on impressionable children -- is instead the advancement of Christian religion.

c. Third, although the City's activity may not foster an entanglement between government and religion, the very fact of a government's choosing to display the symbols of one religion and thereafter possibly of another religion, J.A. 104, invokes precisely the "competition among religious sects for political and religious supremacy" which the Establishment Clause guards against. Committee for Public Education v. Nyquist, 413 U.S. 756, 796 (1973). Given the divisiveness evident in Pawtucket, the record here reveals impermissible excessive entanglement.

In sum, whether viewed as placing the imprimatur of the state on a sectarian belief as in Stone v. Graham, 449 U.S. 39 (1980), as subject to the strict scrutiny test applied in discriminatory contexts such as in Larson v. Valente, 456 U.S. 228 (1982), or under the traditional three-part test of Lemon v. Kurtzman, 403 U.S. 602 (1971), the expenditure of public funds to purchase, maintain and display the sectarian religious symbol of a Nativity scene does not withstand Establishment Clause analysis.

ARGUMENT

This case, which challenges the expenditure of public funds to erect and maintain a Nativity scene in downtown Pawtucket, Rhode Island as part of the City's annual Christmas display, presents an unfortunate conflict between two understandable human concerns.

On one hand is the wish of many residents of Pawtucket to celebrate their Christian religious heritage by symbolically depicting the birth of Christ through the display of a Nativity scene. Not surprisingly, the religious majority is vigorously championed by Pawtucket's chief elected official, Mayor Dennis Lynch, who has vowed "to keep Christ in Christmas" by continuing to display the City's creche.

On the other hand are the legitimate concerns of those, including many devout individuals, who believe that government should not celebrate the religious beliefs of any group and who feel that by choosing to expend public funds to display a religious tableau representing the Divinity of the Christ child, the City of Pawtucket has placed its imprimatur on a set of religious beliefs in violation of the Establishment Clause of the First Amendment.

The precise issue, therefore, is not whether citizens of Pawtucket may display a creche, or even whether a privately erected and maintained creche may be displayed in a public forum, but solely whether the government of Pawtucket may single out a religious symbol and erect it at public expense in celebration of the religious views of the majority.

To many, the dispute may appear trivial. After all, the sums involved are small and the religious symbolism familiar. However, on both a practical and a principled level, the dispute raises the significant issue of the extent to which a religious majority may use the mechanism of government to celebrate and reinforce religous dogma. On a practical level, a child whose family does not believe in the Divinity of Christ must view the public creche as a symbolic representation of his or her status as an outsider,

not only at the level of religion, but at the political level as well. On a principled level, the practice is flatly contrary to the goal of the Establishment Clause which is to divorce religion from government. The Founders recognized that faith is a potent motivating force which has often led believers to enlist the power of the state in the propagation of religious "truth". Pawtucket has chosen to enlist the power of the state to celebrate an appealing and widely shared aspect of Christian dogma. However, if Pawtucket may engage the state in the celebration of a widely shared Christian religious belief, no principled basis exists to prevent all religious groups from seeking to use the state to further their sincerely felt religious ends. The result would be precisely the confusion of religious

dogma and political power which the Establishment Clause sought to preclude.

It is, of course, wholly appropriate for those residents of Pawtucket who wish to do so to band together and to display religious symbols in celebration of their beliefs. The sole issue raised by this case is whether the City of Pawtucket may be used as the vehicle through which such a religous observance takes place.

I. THE ERECTION AND DISPLAY OF A PUBLIC CRECHE PLACES THE IMPRIMATUR OF THE STATE ON A SET OF RELIGIOUS BELIEFS IN VIOLATION OF THE ESTABLISHMENT CLAUSE

A. The Display Places the Government's Imprimatur on a Religious Symbol

Pawtucket's creche depicts the miraculous birth of Jesus to Joseph and the Virgin Mary in a manger in Bethlehem. It symbolically re-enacts a central event in Christian religious belief.

There is, of course, nothing pernicious

about celebrating the birth of Christ. However, by choosing to expend public funds on the purchase, erection and display of such an avowedly sectarian symbol, Pawtucket has placed the imprimatur of the government on a "plainly religious" belief in flat disregard of the Establishment Clause.

In Stone v. Graham, 449 U.S. 39 (1980) (per curiam), the Court was confronted with a statute directing that the Ten Commandments be displayed in Kentucky's public school classrooms. Recognizing the "plainly religious" nature of the Ten Commandments, this Court held that such a symbolic display violated the Establishment Clause because "the mere posting of the copies under the auspices of the legislature provides the 'official support of the state ... government' that the Establishment Clause prohibits." 449 U.S. at 42.

Similarly, in Larkin v. Grendel's Den, ___ U.S. ___, 74 L.Ed.2d 297 (1982), the

Court struck down a Massachusetts statute which permitted churches to veto the grant of a liquor license within 500 feet of a church because the "mere appearance of a joint exercise of legislative authority by Church and State" constituted an impermissible symbolic affirmation of the favored status of religion. 74 L.Ed.2d at 306.

The official display of the sectarian religious symbol at issue in this case is more clearly violative of the Establishment Clause than the symbolic manifestations struck down in Stone v. Graham and Larkin v. Grendel's Den. One need not believe in the Divinity of Christ to appreciate the wisdom of the Ten Commandments, and one need not hold any religious belief at all to appreciate the desire of a congregation to worship free from distractions incident to the sale of liquor. Yet, in Stone, this Court recognized that the display of the Ten Commandments in public schools consti-

tuted a symbolic state affirmation of the religious creed which is recited in the Commandments themselves.[2] And in Grendel's Den, this Court recognized that delegating legislative power to churches constituted an impermissible signal that religion occupied a favored place in the eyes of the state.

The Nativity scene at issue in this case is far more sectarian than the Ten Commandments in Stone or the zoning power in Grendel's Den. It constitutes, not merely an affirmation of religion generally as in Grendel's Den, or an affirmation of

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2. "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers; worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20:1-11; Deuteronomy 5:6-15." Stone v. Graham, 449 U.S. at 41-42.

of the Judeo-Christian ethic as in Stone v. Graham, but a celebration of Christian dogma and the symbolic affirmation of the Divine nature of the Christ child.

This Court has frequently noted that we live by symbols.[3] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); see also Spence v. Washington, 418 U.S. 405 (1974); Stromberg v. California, 283 U.S. 359 (1931). The "short cut from mind to mind", Barnette, 319 U.S. at 632, which Pawtucket fosters by its display of religious symbolism is an obvious one. It is a celebration of the common religious

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3. Justice Jackson, speaking for the Court in Barnette noted: "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.... The State announces rank, function and authority through crowns and maces, uniforms and black robes; the Church speaks through the Cross, the Crucifix, the alter and shrine, and clerical raiment." 319 U.S. at 632 (emphasis added).

heritage shared by Pawtucket's Christian majority and an affirmation of the importance which that heritage plays in the political and social life of the community. There could not be a clearer violation of the Establishment Clause's minimal guaranty of religious neutrality.

Petitioners seek to defend the public display of the Nativity scene by arguing, first, that it no longer conveys a religious message and, second, that such displays are merely an acceptable acknowledgment of our Christian religious heritage. To suggest that a creche does not convey a religious message is to blink at reality. Whatever the ostensible purpose of the display, its religious meaning cannot be negated. It is nothing less than a symbolic restatement of a central tenet of the Christian faith, the miraculous birth of a Divine Savior. Nor can the

display be defended as a mere acknowledgment of our religious heritage. Expending public funds to erect and maintain an avowedly sectarian symbol is far more than acknowledgment; it is support and reinforcement. It is one thing to argue that government may acknowledge our religious heritage by permitting private persons to display religious, as well as political, symbols on public property which has been set aside as a public forum. Cf. Widmar v. Vincent, 454 U.S. 263 (1981). It is quite another to argue that government may "acknowledge" our religious heritage by expending public funds to endorse a sectarian belief.

B. The Nativity Scene is a Religious, Not a Secular, Symbol

Petitioner argues that the presence of the Nativity scene as a part of an otherwise secular Christmas display insulates its overtly religious nature from

Establishment Clause scrutiny. This argument misconstrues and wholly undermines the meaning of the Establishment Clause.

In considering whether the creche retains an independent identity as a religious symbol, it is useful to recall, in Establishment Clause terms, what is meant by religion. In Davis v. Beason, 133 U.S. 333, 342 (1890),[4] the Court observed:

> The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.

The Nativity scene displayed by the City

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4. See also McGowan v. Maryland, 366 U.S. 420, 465-466 (1961)(separate opinion of Frankfurter, J.): "The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehsnive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief."

of Pawtucket expresses, symbolically, the Christian view of man's relationship to Jesus Christ and of reverence to the Divinity of Christ.[5] Far from representing, as the City claims, merely an element of folk tradition and Christmas art, the Nativity scene tells a story, and that story comes neither from folklore nor from history, but from the New Testament of the Bible. Matthew 2:9-11; Luke 2:7-16. As the District Court noted:

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5. The Nativity scene is described in the District Court's opinion as follows: "The figures in the nativity scene are approximately life-sized.... They include kings bearing gifts, shepherds, animals, angels, and Mary and Joseph kneeling near the manger in which the baby lies with arms in apparent benediction. All of the figures face the manger in which the baby lies; several have their hands folded and/or are kneeling. The figures' poses, coupled with their facial expressions, connote an atmosphere of devotion, worship and awe." Donnelly v. Lynch, 525 F. Supp. 1150, 1156 (D.R.I. 1981).

Dr. Ramsbey, an expert in the sociology of religion and an ordained Methodist minister, likewise testified that "the whole setting of the creche is a statement about the divinity if you will or the extraordinariness of the birth of this baby Jesus. It is no ordinary baby and that's very clear from the symbols that are there." J.A. 118; see also 525 F. Supp. at 1160.

> the Court does not understand what meaning the creche, as a symbol, can have other than religious meaning. It depicts the birth of Christ in a way that is not merely historical. It has not been so altered over the years as to relegate its religious connection to a matter of historical curiosity. It is the embodiment of the Christian view of the present nature of Christ. Unless that view has itself lost its religious significance, an artifact that portrays that view simply and unambiguously cannot be other than religious.

Donnelly v. Lynch, 525 F. Supp. 1150, 1167 (D.R.I. 1981).

Although the present-day Nativity scene retains its faithfulness to biblical teachings and to the religious aspect of Christmas vital to Christians, the City argues, in essence, that its actions escape Establishment Clause scrutiny because it erects the Nativity scene along with many secular Christmas symbols. Consequently, it argues, the Nativity scene is inseparable from those

secular symbols. Brief of Petitioners at 17.

This Court, however, has consistently recognized that the religious and the secular may co-exist in the same setting without either losing its separate identity. Indeed, much of this Court's jurisprudence as to the propriety of state aid to parochial schools is premised on an ability to distinguish between secular and religious activities taking place in the same geographical setting. See generally Committee for Public Education v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968).

Although the type of state aid in the parochial school cases is very different from the City of Pawtucket's sponsorship of a Nativity scene, the Court's recog-

nition of the segregability of secular and religious functions is controlling.[6]

The second "context" argument which the City advances relates to the context of Christmas itself, which the City asserts has assumed an independent and dominant secular character. Brief of Petitioners at 16-21. The City cites, in support of its contention, the Court's decision in McGowan v. Maryland, 366 U.S. 420 (1961), which upheld the constitutionality of Maryland's Sunday closing laws. In so ruling, the Court relied on several factors which differ from the issue here. First, and most importantly, respondents do not challenge the constitutionality of declaring Christmas a national or state

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6. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. 734, 743 (1973)(emphasis added).

holiday. Nor do respondents challenge the constitutionality of a publicly funded Christmas display. Rather, respondents challenge only the City's ownership, erection and display of an avowedly sectarian Nativity scene. Thus, any analogy between the secularization of Sunday as a day of rest and Christmas as a national holiday falls substantially short of providing an answer to the question before the Court. Furthermore, in concluding that Maryland's Sunday closing laws, although religious in origin, had become secularized, the McGowan Court relied heavily on similar legislation in effect at the passage of the First Amendment, the centuries old tradition of Sunday as a day of rest, the legitimacy of the state's purpose of promoting one day of rest for all citizens, and the impracticability of substituting another day of the week for Sunday as a day

of rest. None of these factors is present here. The lower court decisions in this case have neither prevented the declaration of Christmas as a national or a state holiday, nor prevented the City from erecting a secular Christmas display. No overriding secular purpose has been advanced by the City for inclusion within its display of a Nativity scene which remains a religious symbol.[7] No centuries old tradition of sponsorship of Nativity scenes throughout the United States is alleged. In short, the issue before this Court is so far removed from the facts and rationale of McGowan v. Maryland as to render that decision of little relevance here.

Finally, it must be noted that the trial court, after listening to the evidence with regard to the religious nature

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7. Indeed, two witnesses for the City testified that the commercial purposes served by the City's Christmas display would be equally well served if the Nativity scene were absent. J.A. 135, 139-40.

of Christmas and of the Nativity scene, made a factual finding, approved by the Court of Appeals, that "Christmas remains a major spiritual feast day for most sects of Christians. It has not lost its religious significance; rather, it has gained a secular significance." Donnelly v. Lynch, 525 F. Supp. 1150, 1163 (D.R.I. 1981).

Thus, the fact that Christmas itself may also have a secular aspect cannot insulate sectarian government actions surrounding Christmas from Establishment Clause strictures.

C. No Historical Exemption Shields Petitioners' Activity From Establishment Clause Scrutiny

Whether viewed as placing the imprimatur of the state on a sectarian belief as in Stone v. Graham, 449 U.S. 39 (1980), or under the traditional three-part test of Lemon v. Kurtzman, 403 U.S. 602 (1971), or the "strict scrutiny" test suggested by

Larson v. Valente, 456 U.S. 228 (1982), the expenditure of public funds to purchase, erect and maintain a sectarian religious symbol cannot withstand doctrinal analysis. Unlike the legislative chaplaincy at issue in Marsh v. Chambers, ___ U.S. ___, 51 U.S.L.W. 5162 (July 5, 1983), no historical exception can be utilized to shield the practice from doctrinal scrutiny. In Marsh, the Brief Amicus Curiae submitted by the United States pointed out repeated instances of the toleration of paid legislative chaplains by the Founders. However, as the Brief Amicus Curiae submitted by the Solicitor General in this case reveals, no similar historical evidence may be marshalled in favor of a practice of publicly-funded sectarian religious displays. What historical evidence is presented in the Solicitor General's brief is designed to demonstrate merely that the Founders were religious men who would not have wished the nation to deny its religious heritage. One need not quarrel with such a conclusion to affirm the decision below. For, in marked

contrast to the wealth of historical documentation presented in Marsh, the Solicitor General's current Brief cannot point to a single instance in which the Founders countenanced the use of public funds to erect avowedly sectarian religious symbols at Christmas time or at any other time.[8] One can hardly

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8. Instead of historical detail, the Solicitor General cites to general passages from Story's Commentaries on the Constitution of the United States. Brief Amicus Curiae of the United States at 6, 10. One can, however, hardly accept as persuasive authority a text which contends that the "real object" of the Establishment Clause "was, not to countenance, much less to advance Mahometanism, Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." 1 Story § 1871, quoted in Marsh v. Chambers, ___ U.S. ___, 51 U.S.L.W. 5162, 5171 (July 5, 1983) (Brennan, J., dissenting).

assume that a President who issued proclamations calling on Americans to engage in Christian prayer [9] would have stinted at publicly funded sectarian symbols unless he understood the practice to have violated the Establishment Clause.

II. THE PUBLIC PURCHASE, ERECTION AND DISPLAY OF A CHRISTIAN RELIGIOUS SYMBOL CONSTITUTES A FORBIDDEN DISCRIMINATION AMONG RELIGIOUS BELIEFS IN VIOLATION OF LARSON V. VALENTE

The Establishment Clause sounds two basic themes. First, it places strict limits on the extent to which government may assist religion generally. E.g. Lemon v. Kurtzman, 403 U.S. 602 (1971). Second, it places even stricter limits on the extent to which government may favor one religious belief over another. Larson v. Valente,

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9. President John Adams issued a number of such proclamations during his Presidency. See Pfeffer, Church, State, and Freedom, 266 (rev. ed. 1967); 3 A.Stokes, Church and State in the United States, 513 (1950).

456 U.S. 228 (1982). As respondents will demonstrate infra in point III, the governmental display of an avowedly religious symbol violates the ban on aid to religion generally; however, as the First Circuit correctly noted below, Pawtucket's creche violates the irreducible core of the Establishment Clause by officially preferring Christian religious beliefs over those of other religions.

In Larson v. Valente, 456 U.S. 228 (1982), this Court invalidated a statute which, on its face, provided for differential treatment of denominational groups. The Court noted that

> when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.

456 U.S. at 246.

Pawtucket's purchase and display of a religious symbol constitutes a governmental "denominational preference" since it celebrates

the doctrinal beliefs of those who embrace the Divinity of Jesus Christ.[10] Thus, applying the teaching of Larson, the First Circuit invalidated the practice because it failed to advance a "compelling governmental interest" by means which are "closely fitted to further that interest". Donnelly v. Lynch, 691 F.2d 1029, 1034-35 (1st Cir. 1982).

The concept that the First Amendment mandates religious neutrality on the part of government did not originate with this Court's decision in Larson. It underlies virtually the entire Establishment Clause jurisprudence of this Court. As the Court noted in Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968):

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10. The District Court noted that "the only religious heritage and traditions that have been part of Pawtucket's official ceremonies and displays are those of the Christian majority of its citizenry.... [I]f the majority's religious heritage and customs are the only ones that, in the end, are 'acknowledged,' the asserted neutral purpose is cast into some doubt." Donnelly v. Lynch, 525 F.Supp 1150, 1172 (D.R.I. 1981).

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Thus, whenever this Court has upheld a degree of state assistance to religious activity, it has explicitly noted that the state assistance was available to all religious groups equally and was merely an analogue of similar assistance offered to secular activities. E.g. Everson v. Board of Education, 330 U.S. 1 (1947) (transportation of non-public as well as public school students); Zorach v. Clauson, 343 U.S. 306 (1952) (released time for religious instruction);

Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions for religious and non-religious property); Roemer v. Board of Public Works, 426 U.S. 736 (1976) (grants to all private colleges); Mueller v. Allen, ___U.S.___, 51 U.S.L.W. 5050 (June 29, 1983) (income tax deductions for parents of private and public school students).

Conversely, whenever state assistance has favored one religion over another, or has favored religion over secular activities, this Court has uniformly invalidated the practice. Thus, in School District of Abington Township v. Schempp, 374 U.S. 203 (1963), the Court invalidated Bible reading in the public schools, noting:

> **The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or**

> dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

Id. at 222.[11]

Similarly, in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), reaffirmed last Term in Mueller, the Court invalidated tax credits for private school tuition because they provided a "special" tax benefit available only to parents of children attending overwhelmingly parochial private schools.

Finally, in Larson v. Valente, 456 U.S. 228 (1982), the Court reviewed the doctrine of neutrality set forth in Everson, Zorach, Epperson, and Schempp and concluded that

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11. The Court in Schempp dispensed with the charge that forbidding Bible reading in the public schools would constitute hostility to religion. Hostility will result, noted the Court, only if the state affirmatively opposed or demonstrated hostility toward religion.

when the state acts preferentially towards certain religions, its actions are subject to strict scrutiny, the standard routinely applied when basic freedoms are infringed by governmental action. In Larson, the challenged statute exempted from detailed registration and reporting requirements imposed upon charitable organizations, those religious organizations which received more than half their contributions from members or from affiliated groups. Because the statute discriminated on its face among religious organizations, the Court held the state to proof, not merely of secular legislative purpose, but of a compelling governmental interest.

The testimony and documentary evidence presented to the District Court demonstrates that by its erection and impassioned defense of the Nativity scene, the City and its officials sponsored not merely religion

generally, but the Christian religion in particular. Although Mayor Lynch testified that the City participated in other holiday celebrations comparable to Christmas, the only holidays he cited were July 4, Memorial Day, and Veteran's Day, all of which are national patriotic holidays not connected with religion. J.A. 110, 114. Furthermore, Mayor Lynch testified that the elimination of the Nativity scene was "a step towards establishing another religion, non-religion, though it may be." J.A. 100. Accepting the Mayor's testimony, one can then infer that he also believes the converse -- that inclusion of the Nativity scene in the City's display is intended to establish the Christian religion.

In addition to the testimony of Mayor Lynch and to the actions of the City, there in any event is no question that most of the residents who wrote to the Mayor and to the

local newspapers concurred in the view of the creche as a Christian symbol.[12]

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12. "Let's take our hats off to our courageous and outspoken Mayor, Dennis M. Lynch, who has come to the defense of all Christians in the controversial crib scene." "Let's gather around the crib." The Evening Times (Dec. 27, 1980). J.A. 151.

"Choice greatings in Christ's name.... I only regret that the ACLU and all the lands do not recognize the fact that this nation was founded upon Christianity. It was founded upon Jesus Christ." Letter from the Trinity Assembly of God. J.A. 157.

"May 'God' bless you in your efforts to keep 'Christ' in Christmas." Letter to Mayor Lynch. J.A. 161.

"Mayor Lynch, I don't speak out about many issues but when a handful of cold blooded atheists strike out at my God, I see red. My family and I are Roman Catholics." Letter to Mayor Lynch. J.A. 163.

In light of these facts, it is evident that the creche is a unique form of City sponsorship of religious symbolism, and, at least partly as a result of its unique status, is commonly accepted as indicative of official support for the religion of the majority.[13] Thus, the City's actions must be classified not as affording a uniform benefit to all religions, but rather as discriminating "among religions" within the meaning of Larson v. Valente. Because the city has failed to advance any legitimate secular purpose -- much less a compelling one -- for its erection and support of a religious symbol, its actions cannot rise to the level of a compelling governmental interest and are therefore invalid.

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13. The Mayor's testimony that he would like to erect a Menorah in the future underscores the accessibility to the City of Judeo-Christian beliefs as opposed to innumerable less popular sects. The Mayor noted that at least part of the reason given for City's proposed sponsorship of a Menorah was to thank the "Jewish bretheren" who supported the City's fight to maintain the Nativity scene. J.A. 104.

III. THE PURCHASE, ERECTION AND MAINTENANCE OF AN OVERTLY RELIGIOUS SYMBOL BY THE CITY OF PAWTUCKET VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT (A) DOES NOT ADVANCE A SECULAR PURPOSE; (B) HAS THE PRIMARY EFFECT OF ADVANCING RELIGION; AND (C) FOSTERS AN EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION

Respondents have demonstrated in Point II that, viewed as a symbolic affirmation of Christian religious belief, Pawtucket's creche constitutes an impermissible discrimination in favor of one sectarian creed. The governmental display of an overtly religious symbol violates as well a second aspect of the Establishment Clause -- the ban on government activity favoring religion as opposed to non-religion. The Court has articulated a familiar three-part test to determine when government activity which assists religion

satisfies the Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602, 612-13, (1971). First, the activity must have a secular purpose;[14] second, the activity may not have the primary effect of advancing religion;[15] and, third, the activity may not foster an excessive entanglement between government and religion.[16] Pawtucket's decision to expend public funds to display a symbolic affirmation of the Divinity of Christ fails to satisfy each of the Lemon criteria.

A. Pawtucket's Expenditure of Public Funds to Purchase and Display a Symbolic Re-enactment of the New Testament's Version of the Birth of the Christ Child Does Not Advance a Secular Purpose

14. See Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97 (1968).

15. Compare Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), with Mueller v. Allen, ___ U.S. ___, 51 U.S.L.W. 5050 (June 29, 1983).

16. Compare Lemon v. Kurtzman, 403 U.S. 602 (1971), with Tilton v. Richardson, 403 U.S. 672 (1971).

The case closest in point to this case is Stone v. Graham, 449 U.S. 39 (1980) (per curiam). There the Court held that the obvious secular significance of the rules of conduct set forth in the Ten Commandments could not obscure their essentially religious nature. Accordingly, the Court ruled that the display of the Ten Commandments on the walls of Kentucky public school classrooms did not advance a secular purpose within the meaning of Lemon. As with the Ten Commandments, Pawtucket's creche has an obvious and well understood doctrinal meaning. Its display is no different than the display of the Ten Commandments in Stone.

Similarly, in School District of Abington Township v. Schempp, 374 U.S. 203 (1963), this Court rejected an argument that reading from the Bible advanced significant secular ends. Just as the Abington Court recognized

the essentially religious nature of the Bible, so the Courts below each recognized the inherently religious nature of the Nativity scene in the context of this case.

Petitioners argue that the basic fallacy in the Court of Appeals and District Court decisions lies in their isolated treatment of the creche as a dominantly religious symbol. "On the record in this case...the City is not sponsoring a creche, but rather is sponsoring a Christmas celebration, a small portion of which includes a creche." Brief of Petitioners at 25. They assert that the contextual purpose of the creche is the advancement of the holiday tradition, the promotion of the central city area as an attraction for the general public, and the promotion of "retail activity during the Christmas season." Brief of Petitioners at 29. These purposes articulated by Petitioners belie the true motivation -- as found by the Courts below -- for

the use of the creche.

First, as the District Court found, the Nativity scene, unlike every other element in the display at Hodgson Park, "appears neither to have been divorced from [its] religious origin nor deprived of [its] centrally religious character by the passage of time." Donnelly v. Lynch, 525 F.Supp. 1150, 1170 (D.R.I. 1981), quoting from School District of Abington Township v. Schempp, 374 U.S. at 278 (Brennan, J. concurring).

Second, respondents introduced, without objection, testimony and newspaper accounts of a press conference, held by Mayor Lynch at the site of the creche shortly after suit was filed, during which the Mayor led a group of children in Christmas carolling and vowed to fight attempts to take Christ out of Christmas. 525 F.Supp. at 1173, 1180.

In light of the evidence before it, the District Court concluded that

> the purpose of including a nativity scene in the Hodgson Park display was not merely the neutral recognition that Christmas possesses a religious significance for some people. Rather, Pawtucket's use of a patently religious symbol raises an inference that the City approved and intended to promote the theological message that the symbol conveys. In the Court's view, nothing in the record undermines the reasonableness of drawing that inference here. Indeed, several statements and actions of the City and the Mayor support it.

Id. at 1172. The District Court similarly noted that the City had made no attempt to disclaim endorsement of the religious statement presented by the creche; that the City's avowed purpose of acknowledging religious heritage and traditions through City ceremonies is discredited by its inclusion of only a Christian symbol in its display; and

that the City's insistence that Christ be kept in Christmas evidences a religious, not a secular, orientation. Id. at 1170-74.[17]

To suggest, as do petitioners, that the figures in the creche do no more to advance the City's purpose than do the figures of Santa Claus and reindeer, is to ignore the non-theological meaning of the latter and the religious origin and the continued theological message about the nature of the Child whose birth is depicted in the

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17. Under well established principles, the District Court's factual findings as to lack of a secular purpose may not be disturbed unless "clearly erroneous." Fed. R. Civ. P. 52(a).

former.[18] Perhaps the District Court's observations best summarize the purpose of the inclusion of the Nativity scene in the Hodgson Park display:

> In the Court's view, the City has accepted and implemented the view of its predominantly Christian citizens that it is a "good thing" to have a creche in a Christmas display, see (II, 60,67-68) (Mayor's testimony), because it is a good thing to "keep Christ in Christmas".

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18. There are, of course, many symbols which may once have communicated a religious meaning similar to the religious message the Nativity scene transmits today, but which have been so secularized as to have lost religious significance. The rote chanting of "God Save This Honorable Court" by a secular court employee; the use of "In God We Trust" as a motto; the inclusion of "Under God" in the Pledge of Allegiance are examples. Unlike Pawtucket's creche, they are rote non-denominational acknowledgments of our monotheistic heritage, rather than a celebration of one sectarian creed. Moreover, they are uttered in wholly secular circumstances. The display of a tableau designed to celebrate the birth of a Divine Savior in connection with the celebration of His birth hardly qualifies as a rote secular symbol which merely acknowledges a religious heritage.

> Irrespective of all the excellent religious reasons that may lead private individuals and organizations and religious institutions to embark on such a crusade, there is no independent secular justification for government's doing so. The Court concludes that the inclusion of the creche in the Hodgson Park display was not prompted by the "clearly secular purpose" that the Lemon test requires. Rather, the nativity scene was made part of the display in order to express the City's approval and endorsement of the religious message that the symbol conveys.

Id. at 1173-74 (footnote omitted).

B. The Primary Effect of Pawtucket's Decision to Display a Creche at Public Expense is to Advance the Christian Religion

This Court has stated that the Establishment Clause encompasses within its reach not only the official establishment of religion but also the "sponsorship, financial

support, and active involvement of the sovereign in religious activity." Committee for Public Education v. Nyquist, 413 U.S. 756 772 (1973), quoting from Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (emphasis added).

Apparent sponsorship of a religious message results in majority sects being preferred while other sects whose beliefs are less favored suffer commensurate discrimination. Roemer v. Board of Public Works, 426 U.S. 736, 747-48 (1976). "So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided." School District of Abington Township v. Schempp, 374 U.S. 203, 283 (1963).

Petitioners argue that only where the religious effect is a primary consequence of governmental behavior will the purpose and effect test be violated. Brief of Petitioners at 33. They assert that the

primary purpose and effect of the City's inclusion in its display of the creche is to celebrate a national holiday and that "the effect of the creche is no more primarily promotional of religion than is the legalization of the holiday." Brief of Petitioners at 34.

Just as in McGowan, there may be ample secular justification for Congress establishing Christmas as a national holiday. But that is not the issue before the Court, and the City's bootstrap argument accordingly must fail. The challenged action does not bestow a "remote" and "incidental" effect advantageous to religion. McGowan v. Maryland, 366 U.S. 420, 449 (1961). To the contrary, the City's erection of the creche has a real and substantial purpose and effect of associating the City with the Christian beliefs that the Nativity scene so dramatically represents. To suggest that the

inclusion of the creche does not have a primary religious effect because it is merely a component of the City's secular Christmas observance does not mute the religious message of the creche. As the District Court found:

> The Court disagrees that the secular context in which the creche is viewed is as neutralizing as the City's argument suggests. The secular and religious aspects of Christmas co-exist comfortably. Thus, when the City commingles secular and religious symbols in the display, it simultaneously evokes both dimensions of Christmas. Santa Claus is not rendered religious by its proximity to the creche the creche is not rendered secular by its proximity to Santa Claus. In fact, by displaying the nativity scene in a setting with Christmas trees, bright lights, Christmas carols, and other Christmas symbols, the City has placed the creche in a setting <u>supportive</u> of its meaning.

Donnelly v. Lynch, 525 F. Supp. 1150, 1177 (D.R.I. 1981) (emphasis in original).

People who view the display in Hodgson Park are not likely to regard the Nativity scene as a mere acknowledgment of a holiday symbol. The City has done nothing to attempt to eliminate the appearance of approval of and affiliation with the Christian view of Christmas. For even if, as the City insists, the creche does promote the goals of peace, charity and goodwill, there is the appearance of official sponsorship of Christian belief which confers more than a remote and incidental benefit on those of the Christian faith.

Respondents introduced significant documentation, as well as expert testimony, that many people viewed the City's display of the Nativity scene as well as the City's actions in support of that display as supportive of the doctrines of Christianity.

As respondents have already noted, many of those who telephoned or wrote to Steven Brown, Mayor Lynch, or the local newspapers applauded the City's support of the religious views of the majority. Dr. Michael Werle, an expert witness in the area of clinical psychology, testified concerning the effect of the Nativity scene and the City's actions in support of that scene on viewers, and particularly on children. According to Dr. Werle, the Christmas display erected by the City of Pawtucket in Hodgson Park would be "absolutely seductive to the interest of a child." J.A. 80. The child's perception of the display will be sharpened, and "the child will notice every part of it and will remember it for a long time, particularly if that child is three, four or five years of age. It will make indelible impressions." Id.

Dr. Werle further testified that for the child who belongs to a non-Christian family, seeing a Nativity scene as part of a City-sponsored Christmas display will raise "profound questions for that child insofar as whether or not he is okay or more importantly and as part of that whether his parents are okay." J.A. 76. The child will question, because of the setting in which the Nativity scene occurs, his identification with the American culture. For Christian adults, Dr. Werle testified that the government sponsorship of a Nativity scene

> encourages a religious chauvinism. For an adult to see such a symbol reinforces an already prevalent attitude in our country that we are a Christian country. We recently heard that on the radio that we are a Christian country and it is only a step from there to believing that therefore other religions and people

> who are of other persuasions are somewhat less important and have less merit so it encourages people who already confuse being an American with being Christian. It makes that confusion more difficult for them to see.

J.A. 76-77

The record compels a conclusion that the City's actions confer more than a remote or incidental benefit on a particular religion. To hold otherwise would require a disregard for the evidence and a contravention of established law.[19]

C. The Actions of the City and of its Officials Have Resulted in Excessive Government Entanglement with Religion

Although its roots can be identified in earlier cases, the "excessive entanglement"

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19. Nor may petitioners argue that government-sponsored religious symbols are forbidden only in public schools, but not public parks. Brief of Petitioners at 35. Especially where, as here, the sectarian display is largely aimed at children, the difference between the government's use of sectarian religious symbolism in schools as opposed to parks is of no legal signigicance.

test was first explicitly articulated in Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). The following Term, the Court made it clear in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), that "excessive entanglement" was a hurdle separate from and additional to the purpose and effect tests.

In Lemon, the Court was confronted with challenges to Rhode Island and Pennsylvania statutes that provided "state aid to church-related elementary and secondary schools." 403 U.S. at 606. In ruling that the statutes in question violated the Establishment Clause, the Court concluded that the state aid, "carefully conditioned...with pervasive restrictions," would require "comprehensive, discriminating, and continuing state surveillance" to insure that the legislature's restrictions were obeyed. This surveillance would involve an "excessive

and enduring entanglement between state and church." 403 U.S. at 619.

The Court next considered what it termed a "broader base of entanglement": the divisive political potential "of these state programs." Id. at 622. Reflecting the wisdom of Justice Harlan in his separate concurrence in Walz and the oft-cited commentary by Professor Freund, the Court observed:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.

403 U.S. at 622 (citations omitted).

The early "entanglement" cases introduced into Establishment Clause analysis what can best be termed a "prophylactic

dimension". Administrative relationships between religious and civil authorities are forbidden, not only when they result in government support or direction of religious enterprises, but also when they are "pregnant with dangers of excessive government direction" of such enterprises. 403 U.S. at 620. This "prophylactic dimension" seeks to safeguard one of the root values protected by the religion clauses: "strife avoidance." Relationships which might cause religiously-based disputes are forbidden, whether or not any real friction between the church and the civil state is actually present.

In the instant case, the evidence and testimony presented in the District Court demonstrates that the creche is, for many people, a clearly religious symbol and that the City's actions in support of the creche are viewed by many as government support for a particular religious viewpoint.

Mayor Lynch himself testified that many of the people who expressed an opinion to him "had made the simple assumption that it [the creche] would always be there because it was a good thing, and they're outraged again over the questioning of what is good for all." Donnelly v. Lynch, 525 F. Supp. 1150, 1158 (D.R.I. 1981). Mayor Lynch also testified that the "bringing of [this] suit was a very divisive thing in the community and that divisiveness had never, and I am a life-long resident of the community, had never been seen in my community before." J.A. 99. Although Mayor Lynch distinguished between divisiveness caused by the instant action and the divisiveness caused by the issue which the action raises, respondents submit that such a distinction is specious. The outrage expressed by many members of the community in response to this case has its foundation in the City's sponsorship of a

religious display. The fact that the City's sponsorship has been challenged and threatened has unquestionably created political divisiveness along religious lines. As summarized by the District Court:

> In sum, the atmosphere has been a horrifying one of anger, hostility, name-calling, and political maneuvering all prompted by the fact that someone had questioned the City's ownership and display of a religious symbol.
>
> * * * *
>
> The absence of religious dissension in Pawtucket over the last forty years does not mean that the governmental action has not produced a division along religious lines. It merely means that until the [respondents] in this case had the temerity to challenge Pawtucket's official practice, the potential for divisiveness remained unrealized. When the challenge finally came, the atmosphere in Pawtucket became charged with religious

> controversy polluted by
> the acrid fumes of
> religious chauvinism."

525 F. Supp. at 1180 (emphasis in original).

While respondents recognize that this Court has never held that the potential for political divisiveness is alone sufficient to invalidate a government's action under the Establishment Clause, it has emphasized that relationships which tend to endanger religious-civil peace are forbidden because they are a "warning signal" that the mandate of the First Amendment has been compromised. Committee for Public Education v. Nyquist, 413 U.S. 756, 798 (1973). Referring to the opinion of Justice Black in Everson v. Board of Education 330 U.S. 1, 8-9 (1947), Justice Powell declared in Nyquist that "competing efforts to gain and maintain the support of government" by religious groups have precipitated "competition among religious sects for

political and religious supremacy" and "occasioned considerable civil strife." 413 U.S. at 796. "Viewing this warning signal of potential divisiveness in conjunction with [the District Court's] findings of improper purpose and impermissible effect" this Court should conclude "that the Establishment Clause has been violated in this case." Donnelly v. Lynch, 525 F. Supp 1150, 1180 (D.R.I. 1981).

Moreover, on a purely pragmatic level, a recognition that Pawtucket may display its creche would, of necessity, require decisions about the display of religious symbols on behalf of other groups as well. The government would inevitably be drawn into the process of deciding which religious symbols should be purchased with public funds and at what cost. In fact, given the non-discrimination principle which permeates Establishment Clause jurisprudence, any government

entity which expends public funds to purchase and display a sectarian symbol must trap itself in an "entanglement" quagmire of its own making, forcing itself to make constitutionally impermissible decisions about which religious groups should benefit by being given a publicly purchased symbol. One can hardly imagine a more egregious entanglement between Church and State.

CONCLUSION

This Court has observed that cases involving forced veneration of our flag are difficult, not because the legal issues are obtuse, but because the flag is our own. Similarly, this case is difficult, not because there is any serious question about the governing legal principles, but because the religion involved is so deeply venerated by so many of us.

Adherence to constitutional principle requires, however, that religious observance -- especially when it is so deeply embraced by the majority -- be confined to the private sphere.

The judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Dated: August 10, 1983

Respectfully submitted,

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